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August 20, 2019

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Room TW-A325  
Washington, DC 20554

**Re: Crown Castle Fiber LLC v. Commonwealth Edison Company  
Proceeding Number 19-169  
Bureau ID Number EB-19-MD-004**

Ms. Dortch:

Pursuant to the Commission's August 14, 2019 Letter Order and 47 C.F.R. 1.733(b), Crown Castle Fiber LLC and Commonwealth Edison Company submit the attached Supplemental Joint Statement filed in the above-referenced proceeding.

Sincerely,

Davis Wright Tremaine LLP

A handwritten signature in blue ink, reading "Ryan Appel".

Ryan M. Appel

cc: Service List

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

CROWN CASTLE FIBER LLC,

*Complainant,*

v.

COMMONWEALTH EDISON COMPANY,

*Respondent.*

Proceeding Number 19-169

Bureau ID Number EB-19-MD-004

**SUPPLEMENTAL JOINT STATEMENT OF STIPULATED FACTS, DISPUTED  
FACTS, AND KEY LEGAL ISSUES**

Pursuant to the Commission's June 21, 2019 Notice of Formal Complaint, 47 C.F.R. 1.733(b), and August 14, 2019 letter Order, Crown Castle Fiber LLC ("Crown Castle") and Commonwealth Edison Company ("ComEd"), through undersigned counsel, submit the following Supplemental Joint Statement Of Stipulated Facts, Disputed Facts, and Key Legal Issues.

The parties incorporate herein by reference the Joint Statement submitted on August 12, 2019, and set forth below only the supplemental materials identified by the Commission in its August 14, 2019 letter.

**JOINT STATEMENT OF ALL PROPOSALS AGREED TO AND REMAINING  
DISPUTES**

Pursuant to the Commission's June 21, 2019 Notice of Formal Complaint and 47 C.F.R. 1.733(b), Crown Castle Fiber LLC ("Crown Castle") and Commonwealth Edison Company

(“ComEd”), through undersigned counsel, submit the following Joint Statement Of All Proposals Agreed To And Remaining Disputes.

## **I. PROPOSALS AGREED TO**

Crown Castle and ComEd have not agreed to any proposals.

## **II. REMAINING DISPUTES**

The Parties have resolved none of their disputes, and other than the agreed to facts identified above, represent that all factual and legal issues set forth in their pleadings remain in dispute.

Although the Parties have discussed settlement in the past, they have not been able to reach a mutually satisfactory resolution of the dispute. The Parties are both amenable to mediation led by Commission Staff.

## **III. DISCOVERY MATTERS**

### **A. Crown Castle’s Response to ComEd’s Discovery**

#### **1. ComEd’s Assertions**

In its first set of interrogatories in both proceedings, ComEd asked Crown Castle to “Identify every correspondence Crown Castle has had with the Illinois Commerce Commission regarding the issues raised in the Complaint.” Crown Castle objected to these interrogatories. The parties met and conferred to discuss this issue on August 19, 2019. ComEd believes these interrogatories are relevant to determine the extent to which Crown Castle, like ComEd, believed the ICC had jurisdiction to resolve this matter, which in turn is relevant to determine the extent of any refunds, if any, might be appropriate for ComEd to pay based on FCC regulation.

## **2. Crown Castle's Response**

Crown Castle objects to the interrogatories on the grounds that Crown Castle's communications with the ICC are not relevant to the ICC's jurisdiction or the extent of any refunds due to Crown Castle. Crown Castle's potential subjective belief regarding the ICC's jurisdiction at any given time does not define the ICC's jurisdiction nor, critically, the obligations of ComEd under the law. ComEd's argument assumes that if Crown Castle at some point in time may have suggested that the ICC had jurisdiction, that ComEd would not be subject to the same liability. But that fundamental premise—that ComEd's liability would not exist if the ICC had jurisdiction—is a legal argument that is both incorrect and irrelevant given that the ICC does not have jurisdiction. Indeed, Crown Castle's pole attachment agreement with ComEd that was initially in the name of NextG Networks of Illinois explicitly provided that pole attachment rates be calculated based on the FCC's formula.

### **B. ComEd Motion To Allow Additional Discovery**

#### **1. ComEd Motion**

ComEd filed a Motion to Allow Additional Discovery on August 16, 2019. ComEd set forth its grounds for its Motion in the Motion.

#### **2. Crown Castle Response**

Crown Castle opposes any such additional discovery and will respond to ComEd's Motion on August 23, 2019, pursuant to the Commission's rules. Without waiving its right to file a full opposition to ComEd's Discovery Motion, Crown Castle briefly summarizes its grounds for why ComEd's Motion for additional discovery should be denied.

Like ComEd's motion to file a surreply, addressed below, ComEd's Discovery Motion should be denied because it exceeds the scope of the Commission's rules and seeks information

that is both irrelevant and, even if it were relevant, should have been raised by ComEd with its Answer, if at all.

ComEd now seeks document discovery that apparently seeks to litigate Crown Castle's regulatory status. Despite the clear CPCN granted by the ICC establishing that Crown Castle is a provider of telecommunications services, ComEd seeks discovery of Crown Castle's customer agreements. Indeed, it seeks all of Crown Castle's customer agreements beyond Illinois. ComEd's arguments reflect a fundamental misunderstanding of telecommunications regulation, for example, complaining that Crown Castle has not filed its standard terms and conditions on a readily accessible website, but citing as the source for that requirement 47 C.F.R. § 42.10, which applies to *interstate*, interexchange carriers. As its CPCN demonstrates, Crown Castle's RF transport and other telecommunications services are *intrastate* and not subject to 47 C.F.R. § 42.10. This same strategy of attempting to litigate a pole complainant's service offerings has been rejected by the Commission repeatedly and should be rejected again here.

#### **IV. SCHEDULES FOR PLEADINGS**

##### **A. ComEd Motion For Leave To Respond To Reply**

On August 16, 2019, ComEd filed a "Motion For Leave To Respond To Reply" ("Surreply Motion"). ComEd set forth the grounds for the relief sought in the Surreply Motion.

##### **B. Crown Castle's Response**

Crown Castle will file its opposition to ComEd's Surreply Motion on August 23, 2019, pursuant to the Commission's Rules. Without waiving its right to file a complete opposition to ComEd's Surreply Motion, Crown Castle briefly sets forth its anticipated grounds for opposition to the Surreply Motion.

First, the Commission's Rules do not contemplate a sur-reply by the defendant. The Rules allow for a complaint, an answer by the defendant, and a reply by the complainant. And

the Rules specifically contemplate that the reply will contain assertions of fact and law “that respond to the factual allegations and legal arguments made by the defendant.”<sup>1</sup> The defendant does not get another “bite at the apple” to bolster arguments raised in its answer. Crown Castle’s reply specifically responded to arguments and facts raised by ComEd’s answer and was, therefore, proper, and ComEd is not entitled to additional pleadings.

Second, as to ComEd’s particular allegations, it is clear that ComEd seeks to distract the Commission with collateral issues that will delay the case and detour the analysis into irrelevant topics. The fact that Crown Castle responded to the new arguments raised by ComEd in its Answer, does not mean that Crown Castle’s Reply introduced new material to justify a sur-reply by ComEd.

Crown Castle’s Reply did not raise questions that amount to a “billboard” issue. ComEd argued in the Answer that Crown Castle’s antenna attachments are not protected under Section 224 and the Commission’s Rules because Crown Castle does not, itself, provide wireless services. Crown Castle’s argument noted that the definition of a pole attachment included “any” attachment by a provider of telecommunications service. Crown Castle’s Reply does not raise issues of attaching wholly unrelated equipment, nor does it raise any other issues that ComEd now tries to generate. Likewise, there is no legitimate issue regarding Crown Castle’s telecommunications services that justify a sur-reply. Crown Castle responded to ComEd’s arguments and allegations, which are without any factual support and entirely based on changing theories and speculations. Doing so did not raise “new allegations.” Crown Castle’s discussion in its Reply regarding the fact that the Commission has defined “insufficient capacity” to mean lack of physical space on the pole, was submitted in direct response to ComEd’s assertion in its

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<sup>1</sup> 47 C.F.R. § 1.728(a).

Answer that it could deny access and demand payment because repairing its deteriorated poles was “expanding capacity.” ComEd could have addressed these legal issues when it raised them in its Answer. Mr. Bingel’s reply declaration, likewise, responds directly to assertions made against him by ComEd. It did not substantially revise his original declaration. Rather, it responded to arguments by ComEd, as well as responding to new information about ComEd’s red tagging program that had not been made available to Crown Castle prior to the Answer. Finally, Crown Castle’s discussion of the corporate transactions that show how Crown Castle is the proper party to these Complaints and the pole attachment agreements was also directly responsive to allegations raised by ComEd in its Answer. Indeed, the fundamentals were submitted with the Complaint.

In addition, in ComEd’s motion for surreply, it argues that Crown Castle’s appurtenance and pole height calculations require further scrutiny, stating by way of example that Crown used the wrong pole universe in calculating the pole height. While Crown Castle disagrees with ComEd’s argument, as an attempt to compromise, on August 18, 2019, counsel for Crown Castle asked counsel for ComEd if ComEd was interested in sharing its basis for its position because if so, the parties may be able to stipulate to pole height and appurtenance figures, thus eliminating the need for dispute and discovery. ComEd counsel responded “Let’s just follow the usual filing process,” and indicated that “ComEd might be willing to discuss stipulations following the usual filing process.”

Finally, even if the Commission were to grant ComEd’s request, the Commission should clearly define the precise issue(s) that it believes warrants a response and ComEd should be instructed to limit its response to such issue(s). And, Crown Castle should be given an opportunity to then respond to whatever sur-reply ComEd files. The Commission’s Rules clearly

contemplate that the complainant is entitled to the final reply addressing whatever answering material the defendant submits.

Respectfully submitted,

**Crown Castle Fiber LLC**

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**Commonwealth Edison Company**

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August 20, 2019



**RULE 1.721(m) CERTIFICATIONS**

I, T. Scott Thompson, Complainant Crown Castle Fiber LLC verify that I have read this Supplemental Joint Statement and to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law; and it is not interposed for any improper purpose.

/s/ T. Scott Thompson

Further, I, Thomas B. Magee, counsel for Respondent Commonwealth Edison Company verify that I have read this Supplemental Joint Statement and to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law; and it is not interposed for any improper purpose.

/s/ Thomas Magee

## **CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2019, I caused a copy of the foregoing Supplemental Joint Statements to be served on the following (service method indicated):

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